

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>IN RE:</b>	)	
	)	
<b>JAMES HIRAM SIMMERING,</b>	)	<b>Case No. 02-12116</b>
	)	<b>Chapter 7</b>
	)	
<b>Debtors.</b>	)	
_____	)	

**MEMORANDUM OPINION**

In its Motion for Clarification of the Automatic Stay, Security State Bank (Bank) seeks a determination of the ownership of certain land and crops that the debtor, James Hiram Simmering, Jr. (Hiram) claimed as his individual property rather than property of Simmering Farms, a general partnership between Hiram and his father, J.V. Simmering, M.D. (Virgil). The Bank, the trustee and the debtor stipulated to certain facts and the matter was submitted to the court for decision.<sup>1</sup> Only the Bank filed a memorandum of authorities.<sup>2</sup> Hiram has reaffirmed his obligation to pay some \$168,500 to the Bank.<sup>3</sup>

The Court has jurisdiction over this proceeding.<sup>4</sup> This contested matter is a core proceeding.<sup>5</sup>

**Factual Background**

Hiram initially filed his case as a chapter 13 on May 8, 2002, prior to the re-enactment of

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<sup>1</sup> Dkt. 85.

<sup>2</sup> Dkt. 84.

<sup>3</sup> Dkt. 82.

<sup>4</sup> 28 U.S.C. § 157(a), (b)(1) and § 1334.

<sup>5</sup> 28 U.S.C. § 157(b)(2)(G).

chapter 12. On May 31, 2002, he converted the case to chapter 12 and an order converting his case was entered on July 19, 2002. He subsequently converted his case to a chapter 7 liquidation on September 25, 2002 and D. Michael Case was appointed trustee.

Early in the case, the Bank filed its Motion for Clarification of the Automatic Stay (Stay Motion).<sup>6</sup> The Bank sought an order that it was not subject to the co-debtor stay and that the assets of Simmering Farms were not property of Hiram's bankruptcy estate. By agreement of the parties, an agreed Order on Automatic Stay (Stay Order) was submitted and the Court entered the order on November 27, 2002.<sup>7</sup> The Stay Order provided that the Bank be accorded relief from the stay to proceed against the personal property of Hiram, Virgil, and Simmering Farms, except for the 2002 milo crop that had been planted by Hiram in the spring. Pursuant to the Stay Order, the crop was to be cut and proceeds net of harvesting expenses were to be held in suspense pending this Court's determination of ownership.

The Stay Order also recited the respective legal positions of the parties concerning the ownership of the crops. The trustee asserted that the crops are Hiram's property and, therefore, property of the estate and, because they were planted post-petition, are free and clear of the Bank's lien. Hiram claimed that "whether by virtue of a valid claim of exemption . . . or by virtue of an agreement with the Bank . . . the debtor is entitled to at least \$6,000.00 of the proceeds of the Crops." The Bank asserted that the crops are property of Simmering Farms partnership and that it has a valid lien on the crops and proceeds, entitling the Bank to the full net proceeds.

From the stipulations and its review of the file, the Court makes the following findings of fact.

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<sup>6</sup> Dkt. 5.

<sup>7</sup> Dkt. 71.

Hiram and his father, Virgil, were partners in Simmering Farms. The assets of Simmering Farms consisted of farm equipment, vehicles and land. The titled vehicles were titled individually in Hiram's name. The land in Sumner County, Kansas, described as the East Half and the East Half of the West Half of the Southeast Quarter of Section 9, Township 32 South, Range 1 West of the 6th P.M. (E/2 and E/2 W/2 SE/4 9-32S-1W) was titled in Virgil and Mary Lou Simmering, his wife. The Bank holds security interests in the farm equipment and a mortgage on the real estate. The Bank received the mortgage from the elder Simmerings in 1990. The Bank's liens secure a large outstanding claim, amounting to \$285,779.82, plus interest.<sup>8</sup> Most of the farm debt was incurred in 1993, but as late as November of 2001, Simmering Farms made a note to the Bank.

In December of 2001, however, Hiram and Virgil signed a handwritten document stating that, as of December 31, 2001, their partnership was to be "terminated."<sup>9</sup> Thereafter, Virgil and Mary Lou entered into an "Escrow Contract" for deed with Hiram, by which they agreed to convey the land to Hiram for \$120,000. Hiram would pay \$6,000 down and pay the remaining balance over fifteen years in monthly payments of \$1,024.66, representing an amortization of \$114,000 at seven percent interest. The contract further recites that the escrow agent, Lawyer's Title, was to accumulate these payments toward paying off the Bank's note related to the real estate.<sup>10</sup>

All of the Bank's notes were signed by both Virgil and Hiram and all of the credit incurred in the name of Simmering Farms. The security agreements were also granted by the partnership. The parties stipulate that until December of 2001, all of the "productive assets" including land, leasehold

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<sup>8</sup> Claim #12.

<sup>9</sup> Dkt. 85, Ex. A.

<sup>10</sup> Dkt. 85, Ex. B.

rights in land, farm equipment, and supplies were assets of Simmering Farms and were subject to the Bank's properly perfected security interests.<sup>11</sup>

The parties stipulate that the milo was planted after Hiram's bankruptcy filing. The milo was cut and sold during 2002, and netted proceeds (after harvesting expenses) of \$51,095.72. They also agree that the milo crop was planted using the equipment "that was, at least as of December, 2001, a Simmering Farms asset, on land[s] that were (either by fee or by lease), of December, 2001, a Simmering Farms Asset."<sup>12</sup>

### Analysis

11 U.S.C. § 541 defines what is property of the bankruptcy estate. Such property includes all legal and equitable interests of the debtor in property as of the time of the commencement of the case.<sup>13</sup> The conversion of the case from chapter 12 to chapter 7 does not "effect a change in the date of . . . the commencement of the case . . ."<sup>14</sup> Section 1207 expands the scope of estate property by including not only that property which the debtor held at filing, but also all property the debtor acquires post-petition but before the case is dismissed or converted to chapter 7.<sup>15</sup> Upon conversion of a chapter 12 case to chapter 7, the property acquired post-petition becomes property of the chapter 7 estate.<sup>16</sup> Thus, if Hiram in fact owned the crop when it was planted, it would be property of the estate. If,

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<sup>11</sup> Dkt. 85, ¶ 6.

<sup>12</sup> Dkt. 85, ¶ 8.

<sup>13</sup> 11 U.S.C. § 541(a)(1).

<sup>14</sup> § 348(a)

<sup>15</sup> § 1207(a)(1).

<sup>16</sup> *Phillips v. White (In re White)*, 25 F.3d 931, 933 (10th Cir. 1994).

however, the partnership remained viable, it would own the crop and the debtor's estate would only own the debtor's partnership interest in Simmering Farms.

Determining what is encompassed in the debtor's property interests at the date of the filing requires the Court to consider the status of the partnership under Kansas partnership law.<sup>17</sup> Kansas adopted the Revised Uniform Partnership Act (RUPA) in 1999. According to KAN. STAT. ANN. § 56a-1304(b) (2002 Supp.), the RUPA "governs all partnerships." Under RUPA, partnerships are entities distinct from their partners.<sup>18</sup> Property is partnership property when it is acquired in the name of one or more partners or in the name of the partnership itself and property is presumed to be partnership property when it is obtained with partnership assets.<sup>19</sup>

Although there is no evidence bearing on how the equipment of Simmering Farms was acquired, the parties have stipulated that all of the assets listed on Hiram's schedules were, until December, 2001, assets of Simmering Farms. Because some of these assets were utilized in the cultivation of the 2002 milo crop the Court can conclude that the crop was the property of Simmering Farms, unless the partnership had been dissolved and wound up by the time the crop was planted. This appears to be Hiram's, and now the trustee's position, in opposing the Bank's motion. But Kansas partnership law dictates another result.

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<sup>17</sup> *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed. 2d 136 (1979) ("Property interests are created and defined by state law."); *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S.Ct. 1386, 118 L. Ed. 2d 39 (1992) (Congress has generally left the determination of property rights in the assets of a bankruptcy estate to state law, citing *Butner*, *supra* at 54).

<sup>18</sup> KAN. STAT. ANN. § 56a-201(a) (2002 Supp.).

<sup>19</sup> KAN. STAT. ANN. § 56a-204(a) and (c) (2002 Supp.).

A partnership is not “terminated” until its affairs are wound up.<sup>20</sup> When, as apparently happened here, the partners agree to part ways, a dissolution occurs.<sup>21</sup> Despite common misconception, dissolution is the beginning, not the end, of the partnership death cycle. The business itself must be wound up and the accounts of the partnership to its creditors and its partners completed before a termination is complete.<sup>22</sup> The assets must be applied to the discharge of the entity’s obligations to its creditors with any surplus to be applied to pay the amounts distributable to partners after all partnership obligations are satisfied in full.<sup>23</sup> The partnership’s business continues for the purpose of winding it up.<sup>24</sup> The person or persons winding up the business “may preserve the partnership business or property as a going concern for a reasonable time . . . and perform other necessary acts.”<sup>25</sup>

When this crop was planted in 2002, the windup of the partnership was not complete. There remained significant obligations owing to the Bank. This suggests that few, if any, of the partnership’s assets had been applied to its obligations as § 56a-807 requires. The accounts of the partnership were not yet settled. Since Hiram used Simmering Farms’ assets to cultivate the crop, the Court concludes that the crop is a product of the continued business of the partnership in dissolution.

The effect of the intervening bankruptcy filing was to transfer Hiram’s interest in Simmering

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<sup>20</sup> KAN. STAT. ANN. § 56a-802(a) (2002 Supp.) (“The partnership is terminated when the winding up of its business is complete.”).

<sup>21</sup> KAN. STAT. ANN. § 56a-801 (2002 Supp.).

<sup>22</sup> KAN. STAT. ANN. § 56a-807(a) (2002 Supp.).

<sup>23</sup> *Id.*

<sup>24</sup> KAN. STAT. ANN. § 56a-802(a) (2002 Supp.).

<sup>25</sup> KAN. STAT. ANN. § 56a-803(c) (2002 Supp.).

Farms to Hiram's bankruptcy estate.<sup>26</sup> Thus, the estate's only interest in the crop is by virtue of Hiram's partnership interest. There is no evidence in the agreed record that would support a conclusion that the crop was planted in Hiram's own right. While there is documentation of his equitable interest in the land, there is no evidence whatsoever of Hiram's alleged newly-acquired interest in the equipment or other partnership assets (except the vehicles which are, and always have been, titled to him). With the winding up being thus far incomplete, the assets remain Simmering Farms assets and are therefore not distributable to the partners. Because the crop is the property of Simmering Farms and because its proceeds are subject to the Bank's security interest, the Bank is entitled to the proceeds. And because Simmering Farms is not the debtor, it receives no protection by virtue of the automatic stay.<sup>27</sup>

As noted above, the debtor asserts that he is entitled to \$6,000 of the proceeds by virtue of some unexplained exemption, but no basis for that entitlement is given. There is no evidence before the Court concerning any expenses Hiram may have incurred in planting the crop. It is possible that Hiram has a claim against the Bank for expenses, but that claim would be the property of the estate and is not before this Court because no application for administrative expense or surcharge was filed. The Court will not speculate about the nature of the estate's claim absent specific requests for relief being filed.

Because Simmering Farms has yet to be wound up, the bankruptcy estate has succeeded only to Hiram's partnership interest and not to a direct ownership interest in the crop proceeds in question.

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<sup>26</sup> 11 U.S.C. § 541(a).

<sup>27</sup> 11 U.S.C. § 362(a); *Otoe County Nat'l Bank v. W&P Trucking, Inc.*, 754 F.2d 881, 883 (10th Cir. 1985).

They are not property of the estate and the Bank is therefore not stayed from taking possession of those proceeds on account of its secured claim.

IT IS SO ORDERED.

Dated this 16th day of June, 2003.

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ROBERT E. NUGENT  
CHIEF BANKRUPTCY JUDGE  
UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS

## CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion** were deposited in the United States mail, postage prepaid on this 16th day of June, 2003, to the following:

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